83-1245

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ROBERT L. WILHELM,

Petitioner,

v.

CONTINENTAL TITLE COMPANY,
ANGELO J. VISCONTI, and
DOROTHY J. PORTER,

Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in ruling that handicapped persons do not constitute a class entitled to the protection of 42 U.S.C. §1985(3); and that a conspiracy by a corporate employer, its president, and others to discharge an employee afflicted with multiple sclerosis from his employment because of his membership in a class of handicapped persons, in violation of state law, is not actionable under §1985(3).

2. Whether the Court of Appeals erred in ruling that nonracial classes are not entitled to the protection of 42 U.S.C. §1985(3).

3. Whether the Court of Appeals erred in permitting the District Court

to dismiss the case by treating the defendants' motion to dismiss the amended complaint as a motion for summary judgment without following the procedures set forth in Rules 12(b) and 56, Fed.R.Civ.P.

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## OPINIONS BELOW

An oral opinion was issued by the United States District Court for the District of Colorado on May 12, 1982.

An opinion (not yet reported) was issued by the United States Court of Appeals for the Tenth Circuit on November 7, 1983.

## JURISDICTION

The date of the judgment sought to be reviewed, and the time of its entry, is November 7, 1983.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

United States Code, Title 42

§1985. Conspiracy to interfere with civil rights.

. . .

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the

object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

## STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Colorado on October 20, 1981. The amended complaint (see Appendix) includes claims for relief under 42 U.S.C. §§1983, 1985, and 1986 (jurisdiction under 28 U.S.C. §§1331 and 1343), and Colo. Rev. Stat. §24-34-301 et seq. (pendent jurisdiction).

On May 12, 1982, the District Court issued an oral opinion (see Appendix for transcript) dismissing the case by treating the defendants' motion to dismiss the amended complaint as a motion for summary judgment without following the procedures set forth in Rules 12(b) and 56, Fed.R. Civ.P. Final judgment was entered on May 20, 1982. An appeal was filed on June 18, 1982.

On November 7, 1983, the United States Court of Appeals for the Tenth Circuit issued an opinion (see Appendix) affirming the judgment of the District Court. The Court of Appeals ruled that handicapped persons do not constitute a class entitled to the protection of 42 U.S.C. §1985(3); that nonracial classes are not entitled to the protection of 42 U.S.C. §1985(3); that the Director of the Colorado Civil Rights Division has absolute official immunity from suit under 42 U.S.C. §1983; and that the District Court did not abuse its discretion by declining to exercise pendent jurisdiction over the claim for relief based on Colo. Rev. Stat. §24-34-301, et seq.

## ARGUMENT

1. In ruling that handicapped persons do not constitute a class entitled to the protection of 42 U.S.C. §1985(3), the Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. People by Abrams v. 11 Cornwell Company, 695 F.2d 34 (2nd Cir. 1982).

2. In ruling that nonracial classes are not entitled to the protection of 42 U.S.C. §1985(3), the Court of Appeals has rendered a decision in conflict with decisions of other federal courts of appeals on the same matter. E.g., Keating v. Carey, 706 F.2d 377 (2nd Cir. 1983); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982), rev'd. on other grounds, ____ U.S. ____, 103 S.Ct. 3352, ___ L.Ed.2d ___

(1983); Ward v. Connor, 657 F.2d 45 (4th Cir. 1981), cert. denied, 455 U.S. 907, 102 S.Ct. 1253, 71 L.Ed.2d 445 (1982); Life Insurance Company of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979); Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235 (3rd Cir. 1978), rev'd. on other grounds, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973), cert. denied, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971). The Court of Appeals has also

rendered a decision in conflict with its own previous decision on the same matter. Dry Creek Lodge, Incorporated v. United States, 515 F.2d 926 (10th Cir. 1975), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

3. In ruling that handicapped persons do not constitute a class entitled to the protection of 42 U.S.C. §1985(3), and that nonracial classes are not entitled to the protection of §1985(3), the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); United Brotherhood of Carpenters and Joiners of America v. Scott, ____ U.S. ____, 103 S.Ct. 3352, ____ L.Ed.2d ____ (1983).

4. The Court of Appeals erred in permitting the District Court to dismiss the

case by treating the defendants' motion to dismiss the amended complaint as a motion for summary judgment without following the procedures set forth in Rules 12(b) and 56, Fed.R.Civ.P. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1955); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973); Franklin v. Oklahoma City Abstract & Title Company, 584 F.2d 964 (10th Cir. 1978); State of Ohio v. Peterson, Lowry, Rall, Etc., 585 F.2d 454 (10th Cir. 1978); Hansbury v. Regents of University of California, 596 F.2d 944 (10th Cir. 1979); Thompson v. Kerr-McGee Refining Corporation, 660 F.2d 1380 (10th Cir. 1981). Therefore, the

Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

# A P P E N D I X

11-7-83 82-1747

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

SLIP OPINION

A-1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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82-1747

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| | | |
|---|---|---|
| ROBERT L. WILHELM, Plaintiff-Appellant, | ) | |
| v. | ) | Appeal From The United States District Court For The District Of Colorado (D.C. Civil No. 81-F-1845) |
| CONTINENTAL TITLE COMPANY, a Colorado corporation, ANGELO J. VISCONTI, individually and in his capacity as President of Continental Title Company, and DOROTHY J. PORTER, individually and in her official capacity as Director of the Colorado Civil Rights Division, Defendants-Appellees. | ) | |

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David L. Smith, Denver, Colorado, for Plaintiff-Appellant.

Perry L. Goorman of Eiberger, Stacy & Smith, Denver, Colorado, for Defendants-Appellees Continental Title Company and Angelo J. Visconti.

Timothy R. Arnold, Assistant Attorney General, State of Colorado (J. D. MacFarlane, Attorney General, Charles B. Howe, Deputy Attorney General, Joel W. Cantrick, Solicitor General, and William Levis, Assistant Attorney General, on the brief), Denver, Colorado, for Defendant-Appellee Dorothy J. Porter.

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Before SETH, Chief Judge, McKAY, Circuit Judge, and BOHANON, District Judge*.

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SETH, Chief Judge.

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*Honorable Luther L. Bohanon, United States Senior District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

Robert L. Wilhelm appeals the dismissal of his claims asserted under 42 U.S.C. § 1985(3), and Colo. Rev. Stat. § 24-34-301, against defendants-appellees Continental Title Insurance Company and its president, Angelo J. Visconti. Claims under § 1983 were alleged against Dorothy J. Porter, Director of the Colorado Civil Rights Division. The federal causes were dismissed for failure to state a cause of action--that a handicap was not a basis for a claim under 42 U.S.C. § 1985 or § 1986. The cause against defendant Porter was dismissed on the ground that she had official immunity. The cause under the state statute was dismissed by the trial court on the ground that there was nothing to support the pendent claim and that there was pending in the state courts a suit asserting the very same cause of action.

Appellant worked as a real estate title insurance salesman at Continental for a year and a half before being promoted to branch office manager in January. In March he learned he had multiple sclerosis, advised his employer, in less than a month he was demoted, and in May discharged. Appellant filed an employment discrimination charge based on handicap with the Colorado Civil Rights Commission. The Commission determined that there was probable cause to believe his charges were true but defendant Porter closed the file due to failure of conciliation.

The questions presented on appeal are: whether handicapped persons constitute a class entitled to the protection of § 1985; whether the district court abused its discretion in declining to exercise pendent jurisdiction over the claim based on

Colo. Rev. Stat. § 24-34-301 et seq., and whether Dorothy J. Porter has absolute immunity from suit under 42 U.S.C. § 1983.

In his first claim for relief, appellant invoked § 1985(3) by alleging that he, as a handicapped person, was a member of a class for which that section was intended to provide a civil remedy.

Section 1985 has been interpreted in Griffin v. Breckenridge, 403 U.S. 88, to require that private conspiracies be based on some type of class-based discriminatory animus. The Court stated:

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."
> (Emphasis supplied.)

The district court based its dismissal of the § 1985(3) claim on appellant's failure to establish that the alleged conspiracy was motivated by a class-based invidiously discriminatory animus. Referring to the decision in Lessman v. McCormick, 591 F.2d 605 (10th Cir.), the district court said, "It is not sufficient to state a claim under Section 1985(3) to allege individual discriminatory animus or even group animus unless the discrimination can be said to be invidious."

In Lessman, we denied appellant's claim under § 1985 that the class of debtors of which she was a member was subject to invidious discrimination because, as in Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir.), the allegations did not show the plaintiff to be the object of class-based invidiously discriminatory animus.

We cited Harrison v. Brooks, 519 F.2d 1358 (1st Cir.), for the requirement that the criteria for the definition of the class must be invidious and the conspiracy against plaintiff was "because" of class membership.

This appeal, as mentioned, reaches us on the dismissal of the § 1985 cause for failure to state a claim, and must be examined under the applicable standard.

We have some serious doubts as to whether there can be a conspiracy between defendant Visconti and the corporation he heads but the issue was not raised in the corporate-officer context, and the trial court did not pass on the question, and we will not do so.

In United Brotherhood of Carpenters v. Scott, ____ U.S. ____, 51 U.S.L.W. 5173, the Court was considering a conspiracy directed by a pro-union group against a

non-union group. The Court made it clear that § 1985(3) did not cover conspiracies motivated by economic, political or commercial animus. The opinion (as in Griffin v. Breckenridge, 403 U.S. 88), contains a significant analysis of reasons why 42 U.S.C. § 1985(3) was enacted and the conditions sought to be remedied. The opinion puts emphasis on the nature of the animus and motivation as to which the legislation was directed, and the groups sought to be protected. The Court describes conditions prevailing in the South in 1871, and the debates in Congress centering on the broad scope of the proposed statute as originally introduced. The Court in Scott said:

> "As we interpreted the legislative history 12 years ago in Griffin, the narrowing amendment 'centered entirely on the animus or motivation that would be required. . . .'"

The Court accords great weight to the "limiting" or narrowing amendment which was adopted and altered the bill as introduced.

The Court in Scott quotes from Griffin as to the importance of the amendment:

> "'The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.' Id., at 102 (footnotes omitted)." (Emphasis supplied.)

The Court in Scott continued as to the above quotation:

> "This conclusion was warranted by the legislative history, was reaffirmed in Novotny, supra, and we accept it as the authoritative construction of the statute."

Of the case before it the Court said:

> "Both courts below answered that question; both held that the section not only reaches conspiracies other than those motivated by racial bias but also forbids conspiracies against workers who refuse to join a union. We disagree with the latter conclusion and do not affirm the former."

The Court in Scott discussed at some length the conditions prevailing in 1871, the actions of the Klan and again the "narrowing amendment," and said:

> "The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill. Senator Edmunds's views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in Griffin, 403 U.S., at 102 n. 9, and still withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern--combatting the violent and other efforts of the Klan and its allies to resist

> and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here."

As to private conspiracies, the Court has thus held that § 1985(3) protects against rights under the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution, also certain equal protection rights not limited by the constraints of the Fourteenth Amendment as to state action. The Court has held that § 1985(3) does not protect under the First Amendment against wholly private conspiracies.

In summary as to the Scott opinion, we find nothing therein to give any encouragement whatever to extend § 1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from Scott we get

a signal that the classes covered by § 1985 should not be extended beyond those already expressly provided by the Court.

In the case before us the Amended Complaint alleges that plaintiff had a particular and serious disease which did or would have physical manifestations. He advised the company of his condition and asserts he was demoted and fired as a consequence. It is apparent that different individuals are handicapped in vastly different ways, for different periods of time, and to very different degrees or extent. The variations in each category are infinite and as a consequence the term "handicapped" does not have a definition capable of a reasonably precise application for the purposes before us. The plaintiff alleged his "membership in a class of handicapped persons." Plaintiff

asserts that "[t]he criteria defining the class of handicapped persons are invidious under Colorado and federal law." The Complaint does not contain a description of a class of persons or group that is sufficiently definite or precise to set against the "class of persons" terminology in § 1985(3). There is no ascertainable class described in the Amended Complaint for the purposes under consideration although there may be for other purposes. Plaintiff declined to further amend and asked for a final judgment.

We feel compelled by United Brotherhood of Carpenters v. Scott, ____ U.S. ____, 51 U.S.L.W. 5173, and by Griffin v. Breckenridge, 403 U.S 88, to hold that even if there could be here developed by further pleading a class of handicapped persons with suffient conditions or factors in common derived from their physical condi-

tion to be ascertainable or indentifiable, it could not come within the provisions of 42 U.S.C. § 1985(3).

In our above examination of the opinion in United Brotherhood of Carpenters v. Scott, ____ U.S. ____, 51 U.S.L.W. 5173, we described the reference to limiting opinions; the emphasis upon the conditions that gave rise to § 1985(3); and more particularly the classes or groups which were then involved in the struggle. The nature of groups so involved, as described in Scott, must influence greatly any analysis of the scope of the act. The adoption of the "limiting amendment" to sort out incidents with no animus or motivation of the kind under consideration is also a dominating factor.

We are concerned with a statute enacted for a particular purpose and to meet par-ticular conditions. The rights and

privileges sought to be protected (as contrasted to the "class") are diverse and with the constitutional overtones are to be construed broadly. However, the classes or groups to be protected are instead to be derived from statutory construction. This in our view the Supreme Court has done in Scott and Griffin. From Scott we repeat part of a quotation appearing above. Thus after referring to Griffin and noting that the Court there withheld judgment as to whether § 1985(3) "went any farther than its central concern --combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here." Thus the Court also withheld judgment, but the significant

part of the statement is that the refusal to go farther was placed on the reason--lacking other evidence of congressional intention. This came after the examinations of such history-evidence in Griffin and Scott, as well as prior cases. We must conclude that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and was not included as a class in what is now § 1985(3). See Cain v. Archdiocese of Kansas City, Kansas, 508 F. Supp. 1021 (D. Kan.).

The appellant urges that it was error for the trial court to dismiss the pendent cause of action based on the state statute. The Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715, held that pendent jurisdiction is "a doctrine of discretion," and that "[i]ts justification lies in considerations of judicial economy, convenience and fairness to litigants . . .,"

and "[n]eedless decisions of state law should be avoided . . . ." The Court also held that if the federal claims were dismissed before trial the pendent claims should be dismissed. See also Clappier v. Flynn, 605 F.2d 519 (10th Cir.), and our prior cases.

We find no error in the dismissal of the pendent claim.

The district court dismissed the § 1983 claim against Dorothy J. Porter on the basis of her absolute official immunity. The claim was brought after she closed the appellant's file due to failure of conciliation.

In dismissing the claim, the district court relied on Butz v. Economou, 438 U.S. 478, and Johnston v. Herschler, 669 F.2d 617 (10th Cir.). The Court in Butz determined that federal agency officials whose

duties involve adjudicatory or prosecutorial functions are absolutely immune from suits for damages. The Court said:

> "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages . . . .
>
> . . . .
>
> "We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts."

438 U.S. at 512-13, 515.

The Court did not distinguish between state and federal officials for purposes of immunity:

> "[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

Id., at 504

The district court followed Butz and our opinion in Johnston (Governor of Wyoming acting in adjudicatory capacity is absolutely immune from § 1983 liability) to find that "an adjudication within either a federal or state administrative agency is immune from suits for damages."

With respect to Dorothy Porter's duties under Colo. Rev. Stat. § 24-34-301 et seq., the district court found:

> "As Director of the Colorado Civil Rights Division, Ms. Porter is required by statute to investigate charges of discrimination, make a finding of probable cause and report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore logical that she should enjoy immunity in that regard."

II R. 10.

The district court did not err in concluding that Dorothy Porter has absolute

immunity. The adjudicatory and prosecutorial nature of her responsibilities is clear.

The judgment of the district court is affirmed.

No. 82-1747 - ROBERT L. WILHELM v. CONTINENTAL TITLE CO., etc., et al.

McKAY, Circuit Judge, concurring:

While I agree generally with the opinion of the court, I add this concurrence to stress the importance of limiting the court's decision solely to the facts before us. Although I agree that United Brotherhood of Carpenters v. Scott, ___ U.S. ___, 51 U.S.L.W. 5173 (July 5, 1983) (5-4), does not leave room for the extension of § 1985(3) to private conspiracies involving the facts of this case, I do not read Scott to foreclose the application of § 1985(3) to conspiracies where the animus is directed toward gender-based classifications or political groups, e.g., "Republicans". Scott at 5177. The five-member majority's refusal in Scott to affirm the Fifth Circuit's conclusion that

classes other than race might be actionable under § 1985(3) should not be read as broadly as this court has attempted to do.

Since the case before us does not present issues of animus directed toward classifications based upon gender, religion or national origin, we leave for another day the resolution of whether a properly pleaded set of facts might bring a class other than race within § 1985(3) and Scott.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1845

| | | |
|---|---|---|
| ROBERT L. WILHELM, Plaintiff, | ) | REPORTER'S |
| v. | ) | TRANSCRIPT |
| | ) | STATUS |
| CONTINENTAL TITLE COMPANY, et al., Defendants. | ) | CONFERENCE |

Proceedings before the HONORABLE SHERMAN G. FINESILVER, Chief Judge, United States District Court for the District of Colorado, beginning at 8:55 o'clock a.m., on the 12th day of May, 1982, in Courtroom 201, United States Courthouse, Denver, Colorado.

APPEARANCES

DAVID L. SMITH, Attorney at Law, 2036 Dexter Street, Denver, Colorado, appearing on behalf of the Plaintiff.

PERRY L. GOORMAN, Attorney at Law, Eiberger, Stacy & Smith, 410 Seventeenth Street, Suite 2390, Denver, Colorado, appearing on behalf of Defendants Continental Title Company and Angelo Visconti.

WILLIAM LEVIS, Assistant Attorney General, Human Resources Section, 1525 Sherman Street, Third Floor, Denver, Colorado, appearing on behalf of Defendant Dorothy Porter.

P R O C E E D I N G S

THE COURT: Wilhelm vs. Continental Title, please. Good morning, gentlemen, please. May I have your names, please.

MR. SMITH: Your Honor, David Smith on behalf of the Plaintiff.

MR. GOORMAN: Perry Goorman on behalf of Continental Title Company and Angelo Visconti.

MR. LEVIS: William Levis on behalf of Dorothy Porter.

THE COURT: Any lawyers who have any area of responsibility are here?

MR. GOORMAN: Yes.

THE COURT: Gentlemen, be seated, please. I am going to enter some orders, and I think you will have a reasonable time. I take it this case has not been settled; is that correct?

MR. SMITH: No, sir.

MR. LEVIS: That's correct.

THE COURT: This matter is set before the Court for status conference this morning. The Court has reviewed the entire file, and the numerous pleadings that have been filed. There are sixteen motions.

We are very well in our second file in this case that was filed in late 1981.

Mr. Wilhelm has filed a suit against Continental Title Company, Mr. Visconti, its President, and Ms. Porter, Director of the Colorado Civil Rights Division, on various employment discrimination charges.

On March 31st, 1978, Mr. Wilhelm, a branch office manager with Continental, learned that he had multiple sclerosis. In late April of 1978, Mr. Wilhelm was demoted to the position of salesman, and was ultimately discharged on May 30, 1978.

He claims that Continental and Visconti conspired to discharge him from his job because of his handicap in violation of 42 United States Code, Section 1985 and 1986. Continental maintains that Mr. Wilhelm was discharged for unsatisfactory job performance.

On June 9, 1978, Mr. Wilhelm filed a charge of employment discrimination with the Colorado Civil Rights Commission

which later determined that there was probable cause to believe the charge was true.

Defendant Dorothy Porter closed the case, however, on June 11, 1980 for failure of conciliation efforts. Mr. Wilhelm charges that Porter acted beyond the scope of her authority and in violation of 42 United States Code, Section 1983 and C.R.S. 1973, Section 24-34-101.

Specifically, Wilhelm maintains that Ms. Porter deprived him of his right to expect to be able to continue his employment with the company without being discriminated against and without having an opportunity for redress of his charge of employment discrimination against the company without a hearing on the merits.

In addition to costs and attorney's fees, Mr. Wilhelm seeks compensatory and punitive damages against all defendants.

We have mentioned that there are sixteen motions outstanding. There are many of these motions which are directed to Plaintiff's counsel's Anti-Discrimination Act claim. These motions touch upon the second claim of Plaintiff's Second Amended Complaint.

This claim is based upon the Colorado Anti-Discrimination Act of the State of Colorado, C.R.S. 1973, 24-34-301, as amended effective July 1st, 1979.

The Defendants have moved to dismiss this claim for relief on various grounds including lack of jurisdiction, failure to state a claim upon which relief can be granted, and expiration of the statute of limitations. Also Defendants move to strike Plaintiff's demand for a jury trial and request for attorney's fees under this claim.

The Court has reviewed the file, the confusing mass of documents submitted by the parties to try to see exactly the posture of this case. We are concerned about the nature and status of the pending state court proceedings in the state Supreme Court and the state District Court, and the irregular course of history that has existed in those respective courts dealing with this litigation.

Because the issues involved in Plaintiff's claim for relief under the Colorado Anti-Discrimination Act present many questions of first impression under state law which are currently pending in actions by the same parties before the Denver District Court and the Colorado Supreme Court, we decline jurisdiction of this pendant claim on the basis of this Court's broad discretionary powers

in this area. Helpful is United Mine Workers v. Gibb, 383 U.S. 715, 1966, and also the rationale and we believe the logic that is set forth in the Colorado Water River Conservation District v. United States, 96 Supreme Court 1236.

Admittedly, that is a case that dealt with not only dismissal, but with abstention. However, we are of the view that the rationale and some of the expressions of the Supreme Court in that case, which reversed the Tenth Circuit, are helpful here.

We do not feel that the Federal Court should be the first court to construe state statutes that go into the body politic and the very organization of a state government without affording the state forums the opportunity to address themselves to those issues, and we are of

the view that those courts, the state District Court, the state Supreme Court, are directing their attention to resolution of many other matters that are submitted to this Court for resolution.

State law with regard to the Colorado Anti-Discrimination Act is very unsettled. Much judicial energy has already been expended as a result of actions filed by Plaintiff in state court on the same issues. We are of the view that it involves an unnecessary exercise of judicial energy and a total lack of judicial economy to have this Court duplicate much of what has already been done by the state courts.

Accordingly, the Motion to Dismiss the Colorado Anti-Discrimination Act claim for lack of jurisdiction filed by Defendants Visconti and Continental Title is

hereby granted as to all Defendants, and the second claim for relief is stricken from Plaintiff's Second Amended Complaint.

As a result of this action, the following motions are moot: Motion for Stay filed by Defendants Visconti and Continental Title, Motion to Strike prayer for punitive damages filed by Defendants Visconti and Continental Title; Motion to Strike request for attorney's fees filed by the same Defendants; Motion to Strike Plaintiff's jury demand filed by the same Defendants; and Motion to Dismiss the Colorado Anti-Discrimination Act claim for failure to state a claim upon which relief can be granted filed by the same Defendants.

The next motions are directed to Plaintiff's Section 1985 and 1986 conspiracy claims. Plaintiff's complaint alleges that in Claim 1 the Defendants

Visconti and Continental Title engaged in a conspiracy to discharge the Plaintiff from his employment with Continental Title Company in violation of 42 United States Code, Section 1985, and that Defendants neglected or refused to use their power to prevent the alleged acts in furtherance of the conspiracy in violation of 42 United States Code, Section 1986.

In a plethora of motions filed here, the Defendants seek to dismiss these claims for lack of subject matter jurisdiction for failure to state a claim upon which relief can be granted, and for expiration of the applicable statute of limitations.

We have considered the motions, the briefs submitted by the parties, and the Court will dismiss Claim 1 of Plaintiff's

Complaint for the following reasons:
To come within the ambit of Section 1985 (3), a complaint must allege five elements.

First, of a conspiracy; two, motivated by racial or other class-based invidiously discriminatory animus; third, for the purpose of depriving, directly or indirectly any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws; four, that the conspirators committed some act in furtherance of the conspiracy, and, five, that the Plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88 at 103-104 is helpful. A defect in any one of these elements is fatal to Plaintiff's claim.

In the instant case, the Plaintiff has sufficiently pled a conspiracy between Defendant Continental Title Company, Defendant Visconti and other third parties to survive a motion to dismiss. Plaintiff has not and cannot, however, demonstrate that the conspiracy was motivated by class-based invidiously discriminatory animus as prescribed by Griffin.

It is not sufficient to state a claim under Section 1985(3) to allege individual discriminatory animus or even group animus unless the discrimination can be said to be invidious. Lessman v. McCormick, 591 F. 2d 605, 1979 Tenth Circuit case.

The underlying principle here is the governmental determination that some groups require and warrant special federal assistance in protecting their civil

rights. Classes that have awarded such protection for the purposes of Section 1985(3) include race, sex and certain political or religious groups.

In the Court's research we have been unable to discover any cases -- and Plaintiff has not cited any that we find are persuasive -- which hold that handicapped persons constitute a class within the meaning of Section 1985(3) as construed by the Supreme Court in Griffin, and the Tenth Circuit has been particularly reluctant to enlarge the ambit of 1985(3). See Ward v. St. Anthony's Hospital, 476 F. 2d 671, a 1973 Tenth Circuit case. Also Cain, C-a-i-n, v. Archdiocese of Kansas City, a Federal District Court case from the District of Kansas, 1981.

The Ward v. St. Anthony's Hospital case involved a doctor's staff privilege at

St. Anthony's Hospital in Denver. The allegation was that there was state action because of licensure of the hospital itself, and also because of the use by the hospital of Hillburton federal funds for construction of part of the hospital and for equipment.

The Tenth Circuit in that case, in upholding the District Court, filed very strong strictures in regard to application of the section in question.

We find no merit in Plaintiff's argument that he is a member of a statutorily protected class under the Rehabilitation Act, 29 United States Code, Section 701. Such a claim is not sufficient to breathe life into a cause of action under Section 1985(3), particularly where Plaintiff has brought no cause of action under the Act.

Accordingly, the Motion to Dismiss for failure to state a claim upon which relief can be granted is hereby granted. Since a valid allegation of class-based invidiously discriminatory animus is also necessary to state a claim for relief under Section 1986, the Defendant's Motion to Dismiss the Section 1986 claim is also granted. No claim under Section 1986 will lie unless there is a valid claim under Section 1985. Taylor v. Nichols, 558 F. 2d 561, a 1977 Tenth Circuit case.

It is therefore ordered that Claim 1 of Plaintiff's Second Amended Complaint is hereby dismissed as to all Defendants and is stricken from the Complaint.

Motions directed to Plaintiff's Section 1983 claim. The third claim for relief in Plaintiff's Second Amended Complaint is based on 42 United States

Code, Section 1983 and the Fourteenth Amendment.

Defendant Dorothy Porter has moved to dismiss this claim against her on the grounds that she enjoys official immunity from prosecution. Specifically, Ms. Porter claims that is dismissing Plaintiff's state claim with the Colorado Civil Rights Division, she was acting in an administrative adjudicatory capacity in accordance with C.R.S. 1973 24-34-306 (4) and Rule 4 of the regulations promulgated by the Commission.

We are of the view that an adjudication within either a federal or state administrative agency is immune from suits for damages. Please see Butz v. Economou, 438 U.S. 478, and also the case of Johnson v. Herschler, Number 80-1342, a Tenth Circuit case, January 21, 1982.

As Director of the Colorado Civil Rights Division, Ms. Porter is required by statute to investigate charges of discrimination, make a finding of probable cause and report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore logical that she should enjoy immunity in that regard.

We conclude that Ms. Porter is immune from prosecution under Section 1983. The Motion to Dismiss the Section 1983 claim is hereby granted. Claim 3 of Plaintiff's Second Amended Complaint is dismissed as to Defendant Porter and is hereby stricken.

As a result of our disposition of these motions, the only claims remaining in this lawsuit are the Section 1983 allegations

against Defendants Visconti and Continental Title Company. The Court directs Plaintiff to file a Third Amended Complaint reflecting these changes and containing only the Section 1983 claim no later than the close of business on Friday, May 21st, 1982. Defendants Visconti and Continental Title shall file an Amended Answer no later than the close of business on Friday, May 28th, 1982.

There are remaining motions. The Motion for Summary Judgment based on the exclusivity provisions of the Colorado Workman's Compensation Act filed by Defendant Visconti and Continental Title is hereby denied.

The consolidated Motions for Summary Judgment based on the statute of limitations filed by Defendants Visconti and Continental Title are declared moot.

Because Defendant Porter has been dismissed out of this lawsuit entirely, the following discovery motions filed against her or on her behalf are moot: The several motions compelling discovery VI, VII, VIII, IX, X XI and Defendant Porter's Motion for Protective Order.

The remaining Motions to Compel seek discovery of personal financial information and tax returns from the Defendant Visconti who has filed a Motion for Protective Order prohibiting Plaintiff from obtaining this information.

Plaintiff maintains the financial information is relevant for his punitive damages claim. Defendant asserts that Plaintiff's request is overly broad and burdensome. For purposes of punitive damages, Plaintiff is entitled to discovery of Defendant's present net worth.

The attorneys should be able to work this problem out on their own. If they can't however, the Court is prepared to limit Plaintiff's discovery to Defendant Visconti's present net worth.

It appears that prospects for settlement in this case are not too bright. The Court is of the view that this case shall proceed for trial preparation. Counsel shall notify the Court if settlement is possible no later than the close of business on Friday, May 21st, 1982.

If counsel are unable to settle this matter, the Court reaffirms the trial date on the Court's three week calendar commencing June 7th, 1982. The court will notify counsel as soon as possible regarding a firm trial date.

The Court directs that those items that are set forth I believe in Paragraph

10 of the pretrial order shall be filed no later than the close of business on Friday, May 21st.

The items listed in Paragraph 10B of the pretrial order, the witness and exhibit lists, trial briefs, other matters, are to be filed with the clerk's office no later than the close of business on Thursday, June 3rd, 1982.

Mr. Smith, do you understand the ruling of the Court, please?

MR. SMITH: Your Honor, the Court has made quite a few rulings in a short amount of time. I would imagine I will have to consult some sort of written order to be placed in the file.

THE COURT: I am not intending to have any written order, counsel.

MR. SMITH: Okay. I think I basically have it down. There was one point that I

wanted to ask the Court about. In connection with the Court's rulings on the motions, various motions to dismiss, I understand -- I think I understand -- that all of the claims brought by the Plaintiff in this case in the Second Amended Complaint have been dismissed with the exception of the third claim, the 1983 claim, and Defendant Porter has been dismissed from that claim. Is that correct?

THE COURT: That's correct.

MR. SMITH: When the Court says the Defendant Porter has been dismissed from the claim, does that mean only in her individual capacity or is the Court also saying that the Colorado Civil Rights Division is dismissed?

THE COURT: I am going to dismiss the Colorado Civil Rights Division also.

MR. SMITH: In that case, your Honor, that only leaves two Defendants in the case; that would be Defendant Continental Title Company and Angelo Visconti, who is the President of that company.

THE COURT: That's correct.

MR. SMITH: And under those circumstances there is no state action, so I can't amend the complaint to allege state action under 1983.

THE COURT: Counsel, that's how this Court sees the issues joined in this case. Now, if there is any other approach --

MR. SMITH: Well, maybe I should give the Court a preview. If I did amend the complaint to a 1983 action against those two defendants, then I would have to confess that no state action exists, and therefore no cause of action. Presently there is no 1983 suit against those two

defendants, and I don't perceive that I can file a 1983 case against Continental Title Company and Angelo Visconti, so I have no case against them, and I don't want to use the Court's time to file a 1983 case against purely private plaintiffs because there is no case.

MR. GOORMAN: If I may, your Honor.

THE COURT: Please.

MR. GOORMAN: I would concur with Mr. Smith's statements as far as a potential claim, I think, under 1983 against those defendants because there is no state action.

I think the problem is in the first complaint there was a little bit of vagueness in who the third complaint applied to, and that's why I, in the motions to dismiss, obviously to protect my clients, responded just to cover them. Although I

didn't feel that he, Mr. Smith, was actually alleging it, I just wasn't sure because of the vagueness.

I would concur there is not any 1983 claim as far as I can see. They are just a separate corporaton, and he is an officer and there is no involvement with the state whatsoever, and I don't think there is such a claim. If Mr. Smith wants to --

THE COURT: Counsel, do you care to make any additional statement?

MR. LEVIS: I have no statement, your Honor.

THE COURT: Counsel, the only potential claim could be if there is any coloration of any state law or any involvement or nexus between Continental, Visconti and the State of Colorado.

MR SMITH: Well, that's the question then that I would get into, your Honor, but the Court has dismissed the conspiracy claim in this case.

Of course the conspiracy action can be brought under 1983 as well as under 1985.

THE COURT: In the state court.

MR. SMITH: Is the basis for the Court's dismissal of the conspiracy action -- does that preclude counsel from -- or the Plaintiff -- from bringing a conspiracy action under 1983 as far as the Court is concerned?

THE COURT: Counsel, I am not going to prejudge. I mean I have labored hard in trying to bring some rationale out of this. The only potential claim I believe you have in this case is if there is any connection of Visconti and Continental with the State of Colorado, and Ward v. St. Anthony's Hospital is very strong

against you in that regard, you understand. That is the only potential area of recovery that you have got in Court.

This Court is not inclined to grant any Rule 54 order in this case for an appeal on less than an entire totality of the subject matter.

Now, keep in mind that the state court, a state court does have 1983 jurisdiction.

MR. SMITH: Well, no 1983 case has been pled in the state court.

THE COURT: Do you understand the state courts do have jurisdiction. Now, I don't know what that does to any amendment you might seek to proceed with in the state court.

MR. SMITH: Well, your Honor, at the present time, as the Court may be aware, that the state court case is hung up in the Supreme Court on writs of prohibition, and, frankly, I see that as a futile

effort to try to go to the state court at this particular time to attempt to amend the complaint to allege a 1983 action.

We have been around Robin Hood's barn, so to speak, on that in that case, and I don't believe that it would be useful to go further with that matter.

If I could just ask the Court, is the sole basis for the Court's decision in relation to the 1985 claims of this case that there is no class-based discrimination shown under Griffin v. Breckenridge? Is that the sole basis?

THE COURT: Counsel, I have given to you the best rationale I can. However, the Court reserves enlarging on this opinion at a later time should a request be made for a transcript.

The Court may add to it, and also the Court may enlarge upon it as the case

might be, but, counsel, I have given you the Griffin v. Breckenridge case, Lessman v. McCormick case, that are quite helpful. I have given you the Ward v. St. Anthony's case, and also Cain v. Archdiocese, and these are rather clear cases in regard to what issues are viable here.

And the Court is of the view that the only potential is a 1983 claim, and that is if you could bring it within some ambit of state -- any nexus between the State of Colorado --

MR. SMITH: In that case, your Honor, I do not retract any statement that I have made in regard to bringing a 1983 action solely against Continental Title Company and Angelo Visconti.

However, I will state to the Court that if I can satisfy in my own mind that there is a colorable claim against Continental

Title Company and Angelo Visconti because of the involvement of the State in this case, and that therefore 1983 action can be brought, if I can satisfy myself that I can in good conscience bring a suit of that type, I may very well amend the complaint by May 21st.

THE COURT: I have asked that it be filed -- that you further amend the complaint by that date. Please read the Ward v. St. Anthony Hospital case, though. That deals with the connection and what nexus there must be between actions by the State of Colorado and the entity that is claimed to have discriminated.

So that there could be a determination if there has been any state involvement. Please.

MR. GOORMAN: Assuming for purposes of argument that the Plaintiff does file an

amended -- Third Amended Complaint, your Honor, we have until Friday, May 25th in which to file an Answer. Would that be without prejudice to any motions to dismiss as well?

THE COURT: I will ask you to file an unequivocal Answer without prejudice to filing any other Rule 12 or other motions.

MR. GOORMAN: Thank you. Very good.

THE COURT: I want to keep the case at being at posture of moving along. Thank you very much.

(Whereupon, this hearing was then concluded at the hour of 9:20 o'clock a.m. this date.)

REPORTER'S CERTIFICATE

I, Suzanne M. Claar, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the

proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

Dated at Denver, Colorado, this 14th day of May, 1982.

/s/ Suzanne M. Claar
Suzanne M. Claar, RPR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 81-F-1845

| | | |
|---|---|---|
| ROBERT L. WILHELM,<br><br>Plaintiff,<br><br>vs.<br><br>CONTINENTAL TITLE COMPANY, a Colorado corporation; ANGELO J. VISCONTI, individually and in his capacity as President of Continental Title Company; and DOROTHY J. PORTER, individually and in her official capacity as Director of the Colorado Civil Rights Division,<br><br>Defendants. | ) | SECOND AMENDED COMPLAINT |

COMES NOW the Plaintiff, Robert L. Wilhelm ("Wilhelm"), and states the following claims for relief:

FIRST CLAIM

1. This is a claim for relief under 42 U.S.C. §§1985 and 1986. Jurisdiction of the Court over the subject matter is

invoked pursuant to 28 U.S.C. §§1331 and 1343.

2. In May of 1976, after working in the real estate business since 1963, Wilhelm accepted employment as a real estate title insurance salesman with the Defendant Continental Title Company ("Company").

3. In January of 1978, Wilhelm was promoted to a position as manager of a branch office of the Company.

4. On or about March 29, 1978, the Company made a decision to hire, in the future, the Defendant Angelo J. Visconti ("Visconti") as its President.

5. On or about March 31, 1978, Wilhelm discovered, through medical diagnosis, that he had multiple sclerosis. This information was made known to the Company and Visconti.

6. Beginning on or about March 31, 1978, and continuing to the present, the Company and Visconti engaged in a conspiracy with each other and with third persons for the purpose of depriving, either directly or indirectly, Wilhelm of the equal protection of the laws, or of equal privileges and immunities under the laws. Specifically, the Company and Visconti engaged in a conspiracy to discharge Wilhelm from his employment with the Company because of his membership in a class of handicapped persons. The criteria defining the class of handicapped persons are invidious under Colorado and federal law. One or more persons engaged in the conspiracy did, or caused to be done, an act or acts in furtherance of the object of the conspiracy, whereby Wilhelm was injured in his person or property.

7. On or about April 15, 1978, Visconti was hired as President of the Company.

8. In the last half of April of 1978, the Company and Visconti demoted Wilhelm from his position as manager of a branch office of the Company to a position as salesman. No reason was given for the demotion.

9. On or about May 30, 1978, the Company and Visconti discharged Wilhelm from his employment with the Company. At the time of the discharge, Visconti stated that Wilhelm was having trouble getting around to do his job. Wilhelm replied that the reason for this was that he had multiple sclerosis.

10. On or about June 9, 1978, Wilhelm filed a charge of employment discrimination, based on handicap, against the Company with the Colorado Civil Rights

Commission. Subsequently, the Company and Visconti requested several persons to write letters stating that Wilhelm failed to perform his job satisfactorily while he was employed with the Company. On several occasions in 1981, the Company and Visconti stated that unsatisfactory job performance was the reason for discharging Wilhelm from his employment with the Company. These statements are false, and were made for the sole purpose of covering up the true reason for discharging Wilhelm.

11. The Company and Visconti neglected or refused to use their power to prevent the acts in furtherance of the object of the conspiracy which they knew or reasonably should have known were about to be committed.

12. As the direct and proximate result of the acts in furtherance of the object

of the conspiracy, Wilhelm suffered economic loss, including loss of salary and benefits, loss of reputation and good name, and loss of economic opportunity. Wilhelm also suffered embarrassment and humiliation, loss of marital harmony, mental distress, and mental and physical deterioration.

SECOND CLAIM

13. This is a claim for relief under C.R.S. 1973, §24-34-301 et seq. Jurisdiction of the Court over the subject matter is invoked pursuant to the Court's pendent jurisdiction.

14. On or about May 30, 1978, the Company and Visconti discharged Wilhelm from his employment with the Company on account of his handicap of multiple sclerosis.

THIRD CLAIM

15. This is a claim for relief under

42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of the Court over the subject matter is invoked pursuant to 28 U.S.C. §§1331 and 1343.

16. On or about June 9, 1978, Wilhelm filed a charge of employment discrimination, based on handicap, against the Company with the Colorado Civil Rights Commission.

17. On or about July 2, 1979, the Colorado Civil Rights Commission determined that there is probable cause to believe that Wilhelm's charge of employment discrimination is true.

18. On or about June 11, 1980, the Defendant Dorothy J. Porter ("Porter") acted under color of Colorado law and beyond the scope of her authority as Director of the Colorado Civil Rights

Division to close the charge of employment discrimination which Wilhelm had filed against the Company with the Colorado Civil Rights Commission, thus depriving Wilhelm of his liberty and property under C.R.S. 1973, §24-34-301 et seq. Specifically, Wilhelm was deprived of his right to expect to be able to continue his employment with the Company without being discriminated against on account of his handicap of multiple sclerosis. Wilhelm was also deprived of his right to expect to have an opportunity for redress of his charge of employment discrimination against the Company with the Colorado Civil Rights Commission. Since Porter acted to close the charge of employment discrimination without granting Wilhelm a hearing on the merits of the charge, Porter violated the due process clause

of the Fourteenth Amendment to the Constitution of the United States.

19. As the direct and proximate result of the due process violation, Wilhelm suffered economic loss, including loss of salary and benefits, loss of reputation and good name, and loss of economic opportunity. Wilhelm also suffered embarrassment and humiliation, loss of marital harmony, mental distress, and mental and physical deterioration.

WHEREFORE, Wilhelm requests the following relief:

a. the recovery of all compensatory damages, including back pay;

b. the recovery of punitive damages;

c. the recovery of interest, costs, and reasonable

attorney's fees; and

d. such other and further relief as the Court and jury deem just and proper.

Respectfully submitted,

/s/ David L. Smith
David L. Smith #006934
Attorney for Plaintiff
2036 Dexter Street
Denver, Colorado 80207
(303) 620-7012

Plaintiff's address:

7880 West 47th Avenue
Wheat Ridge, Colorado 80033

CERTIFICATE OF MAILING

The undersigned certifies that on this 28th day of January, 1982, true and correct copies of the foregoing Second

Amended Complaint were mailed, postage prepaid, to:

Perry L. Goorman, Esq.
410 17th Street,
Suite 2390
Denver, Colorado
80202

William Levis,
Assistant
Attorney General
Human Resources
Section
1525 Sherman St.
3rd Floor
Denver, Colorado
80203

/s/ David L. Smith

NO. 83-1245

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ROBERT L. WILHELM,

Petitioner,

vs.

CONTINENTAL TITLE COMPANY, ANGELO J. VISCONTI, and DOROTHY J. PORTER,

Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS
Continental Title Company and
Angelo J. Visconti

## QUESTION PRESENTED FOR REVIEW

Respondents disagree with the statement of questions presented for review by the Petitioner and submit that the question posed by this appeal is properly characterized as follows:

1. Whether the Tenth Circuit Court of Appeals erred in ruling that handicapped persons do not constitute a class included within the scope of 42 U.S.C. §1985(3).

Respondents submit that Petitioner's statement of questions presented for review is inaccurate in that question number 2 raises settled matters already decided by this Court, as more fully addressed below. Issue number 3 presented by Petitioner was not raised in timely fashion below and consideration here is improper, and further, was not the basis of decision by the Tenth Circuit. Accordingly, Petitioner's issue number 3 is not properly presented to this Court, as more fully addressed below.

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## OPINIONS BELOW

An oral opinion was issued by the United States District Court for the District of Colorado on May 17, 1982 (See Appendix to Petition for Writ of Certiorari, pp. A-24 to A-56).

The opinion issued by the United States Court of Appeals for the Tenth Circuit was rendered on November 7, 1983, and is officially reported as follows:

Wilhelm v. Continental Title Company., et al.,

720 F.2d 1173 (10th Cir. 1983)

NO. 83-1245

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1983**

---

ROBERT L. WILHELM,

Petitioner,

vs.

CONTINENTAL TITLE COMPANY, ANGELO J. VISCONTI, and
DOROTHY J. PORTER,

Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Continental Title Company and Angelo J. Visconti, request that the Court deny the Petition of

Robert L. Wilhelm, for a Writ of Certiorari, to be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered November 7, 1983.

## SUPPLEMENTAL STATEMENT OF THE CASE

Respondents submit their Supplemental Statement of the Case to correct misstatements and omissions in Petitioner's Statement of the Case.

Contrary to Petitioner's Statement of the Case (page 12 of the Petition for Writ of Certiorari) on May 12, 1982, the District Court issued an oral opinion granting Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (see Appendix for Respondent's Motion to Dismiss) and thereby dismissed Petitioner's claims

asserted under 42 U.S.C. §1985 and §1986. There was no suggestion in the District Court Order (see Appendix to Petition for Writ of Certiorari, pp. A-24 to A-56) that it treated the Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted as a Motion for Summary Judgment.

Furthermore, contrary to Petitioner's suggestion that the United States Court of Appeals for the Tenth Circuit erred when it allegedly permitted the District Court to dismiss Plaintiff's claims under 42 U.S.C. §1985 and §1986 by granting Defendants' Motion to Dismiss, the opinion of the Tenth Circuit Court of Appeals (see Appendix to Petition for Writ of Certiorari, pp. A-2 to A-23) makes it abundantly clear

that the appealed issues were before that Court on the dismissal of the cause for failure to state a claim upon which relief can be granted and were examined under the applicable standard.

Finally, as more fully discussed below, the Tenth Circuit's opinion did not hold, contrary to applicable law, that non-racial classes are not entitled to the protection of 42 U.S.C. §1985(3) as asserted by Petitioner in his Statement of the Case.

## REASONS FOR DENIAL OF PETITION OF WRIT OF CERTIORARI

### I. The Tenth Circuit's decision is in accord with applicable decisions of the United States Supreme Court defining the scope of a proper class under 42 U.S.C. §1985.

The Supreme Court of the United States in United Brotherhood of

Carpenters and Joiners of America, Local 610, AFL-CIO, et al. v. Scott, et al., _____ U.S. _____, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) recently defined the scope of an asserted claim under 42 U.S.C. §1985(3). While not directly holding that handicap is not a "class" within the scope of §1985(3), this Court's opinion contained pronouncements and analysis which are determinative, if not highly persuasive, of that issue. It is submitted that in view of this Court's holding in Scott, the Petition for Writ of Certiorari should be denied and the Tenth Circuit opinion affirmed.

In Scott, this Court reversed the Fifth Circuit Court of Appeals holding that 42 U.S.C. §1985(3) reaches alleged conspiracies motivated by political or economic bias. As the present record

reflects, the Tenth Circuit Court of Appeals held that handicap was not a proper "class" within the ambit of 42 U.S.C. §1985(3).

After initially addressing the issue of whether state action is required in a §1985 claim alleging interference with First Amendment rights, this Court reversed the Fifth Circuit "on the dispositive ground that §1985(3)'s requirement that there must be 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action', Griffin v. Breckenridge, 403 U.S., at 102, was not satisfied in this case." _____ U.S. _____, 103 S.Ct. at 3358, 77 L.Ed.2d at 1057. Specifically, this Court reversed the lower court decisions that §1985 forbids

conspiracies against workers who refuse to join a union. More importantly, this Court refused to affirm the lower court decisions that §1985 reaches conspiracies other than those motivated by racial bias.

In reaching its conclusion, this Court reviewed the historical context of §1985 and its genesis in the Reconstruction era. The Court, in a highly persuasive statement, said:

> In the first place, it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negros and those who championed their cause, most notably Republicans. 103 S.Ct. at 3359, 77 L.Ed.2d at 1059 (Emphasis added).

By this statement, this Court expressed in strong and forceful language the narrow interpretation to be applied to §1985(3) and that such interpretation encompasses only those classes within its historical context. In other words, this Court's opinion in Scott dictates that handicap does not come within the scope of 42 U.S.C. §1985.

In Scott, this Court discussed how union/management relationships are governed in specific detail by the National Labor Relations Act, 29 U.S.C. §151 et seq. This was used as an example of statutorily addressing economic conflicts and relationships. This is consistent with this Court's holding and analysis in Great American Fed. S. & L. Ass'n. v. Novotny, 442 U.S.

366 (1979), wherein the existence of Title VII, 42 U.S.C. §2000(3), et seq, precluded the use of §1985 as a remedy. Scott, further defined the scope of §1985 by stating:

> Economic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law prescribing injuries to persons and property. ___ U.S. _____, 103 S.Ct. at 3361, 77 L.Ed.2d at 1061.

The leading case on the scope of §1985 is Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court enunciated the requirement of some recognized class-based invidious discriminatory animus which must exist to support the conspiracy. As the Court stated:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animous behind this conspirator's action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. 403 U.S. at 103 (Emphasis added).

A careful review and analysis of the decision below in this proceeding reveals that the Tenth Circuit applied the proper interpretation to a claim asserted under §1985(3), in conformance with Scott and Griffin. After reciting the pertinent factual allegations from the pleadings, the Tenth Circuit opinion discusses at great length this Court's opinion and analysis in Scott, and particularly this Court's comments

pertaining to the historical analysis of §1985 and the Congressional intent relative to that law. The Tenth Circuit opinion stated, in pertinent part, as follows:

> In our above examination of the opinion in United Brotherhood of Carpenters v. Scott, ____ U.S. _____, 51 U.S.L.W. 5173, we described the reference to limiting opinions; the emphasis upon the conditions that gave rise to §1985(3); and more particularly the classes or groups which were then involved in the struggle. The nature of groups so involved, as described in Scott, must influence greatly any analysis of the scope of the act. The adoption of the "limiting amendment" to sort out incidents with no animus or motivation of the kind under consideration is also a dominating factor.
>
> We are concerned with a statute enacted for a particular purpose and to meet particular condi-

tions. The rights and privileges sought to be protected (as contrasted to the "class") are diverse and with the constitutional overtones are to be construed broadly. However, the classes or groups to be protected are instead to be derived from statutory construction. This in our view the Supreme Court has done in Scott and Griffin. From Scott we repeat part of a quotation appearing above. Thus after referring to Griffin and noting that the Court there withheld judgment as to whether §1985(3) "went any farther than its central concern -- combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we folow the same course here." Thus the Court also withheld judgment, but the significant part of the statement is that the refusal to go farther was placed on the reason -- lacking other evidence of congressional intention.

> This came after the examinations of such history-evidence in Griffin and Scott, as well as prior cases. We must conclude that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and was not included as a class in what is now §1985(3). See Cain v. Archdiocese of Kansas City, Kansas, 508 F.Supp. 1021 (D. Kan.). 720 F.2d at 1177.

Clearly, the Scott decision was carefully followed by the Tenth Circuit in the rendering of its opinion in the instant case. Indeed, this is apparent from the opinion itself when the Tenth Circuit stated:

> In summary as to the Scott opinion, we find nothing therein to give any encouragement whatever to extend §1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from Scott we get a

> signal that the classes covered by §1985 should not be extended beyond those already expressly provided by the Court. 720 F.2d at 1176.

Allegations of conspiracy on the basis of handicap are not recognized within the scope of equal protection or equal privileges and immunities as defined by §1985. Allegations of discrimination in employment on the basis of handicap do not create a deprivation of equal enjoyment of those peculiar rights secured by the Constitution to all persons. See, Great American Fed. S. & L. Ass'n. v. Novotny, supra.

On the basis of the foregoing, it is submitted that the opinion below of the Tenth Circuit Court of Appeals is clearly in line with applicable

precedent from this Court. Scott clearly limited the scope of a claim asserted under 42 U.S.C. §1985. The Tenth Circuit's decision is in line with this Court's holdings in Scott and Griffin. Accordingly, no basis exists on which to grant the Petition for Writ of Certiorari, and this Court should deny the Petition.

**II. The Tenth Circuit's decision does not conflict with the decision of another federal circuit court of appeals on the same matter.**

As a second reason in support of his Petition, the Petitioner asserts that a conflict exists between the decision rendered by the Tenth Circuit below and the decision by the Second Circuit Court of Appeals in People by Abrams v. 11 Cornwell Company, 695 F.2d

34 (2d Cir. 1982) (hereinafter "Abrams"). For the reasons discussed below, it is submitted that no conflict justifying the granting of the Petition exists.

Initially, it should be pointed out that the decision rendered by the Second Circuit Court of Appeals in People by Abrams v. 11 Cornwell Co., supra, was rendered on November 30, 1982, prior to the issuance of this Court's opinion in Scott, supra. As such, it is submitted that the Abrams decision is not truly in conflict with the Tenth Circuit decision below. Clearly, when it issued its opinion, the Second Circuit did not have the benefit of this Court's opinion and reasoning as to the scope and extent of a claim asserted under 42 U.S.C. §1985 as declared in Scott. While the

existence of a conflict between decisions of federal circuit courts of appeal is an important factor in the determination of the granting of a Petition for Writ of Certiorari, it is respectfully submitted that no conflict justifying the granting of the Petition exists here. It is respectfully submitted that this Court's decision in Scott, as followed by the Tenth Circuit in its decision below, clearly defined the applicable scope of a claim under 42 U.S.C. §1985. As such, the Abrams decision is not legitimate authority for the issues presented and no actual conflict exists.

In addition, it is submitted that Abrams is inapplicable on other grounds as a basis for asserting a conflict with the decision below. Specifically, this

Court's attention is directed to fn. 3 of the opinion in Abrams, 695 F.2d at 40-41, which states as follows:

> Judge Pratt found the claim based on the "preventing or hindering" clause of §1985(3) to be substantial. Accordingly, he did not reach the question whether the state's additional claim under §1985(3) that 11 Cornwell conspired to deprive mentally retarded persons as a "person or class of person" of equal protection of the laws was substantial. In light of our holding below agreeing with Judge Pratt that the "preventing or hindering" claim was substantial, we likewise need not reach the substantiality of the additional claim.

In other words, the Abrams opinion is distinguishable from the Tenth Circuit opinion as to the basis of the decision. Abrams was decided upon a different clause of §1985 than the

present case. A careful reading of the Abrams decision will disclose that the Second Circuit Court of Appeals itself declined to hold that mentally retarded persons were a "class" within that portion of §1985 relied upon by Petitioner here. Rather, the Second Circuit limited its holding to the preventing or hindering clause of §1985. As such, there is no legitimately existing conflict between the decision of the Second Circuit in Abrams and the Tenth Circuit in this case. Accordingly, the Petition should be denied.

Another distinguishing factor that illustrates the lack of a "conflict" between the Abrams decision and the Tenth Circuit decision is that the Abrams decision directed itself to a

purported class of "mentally retarded persons". In the instant case, the Tenth Circuit distinguished its holding when it stated as follows:

> We feel compelled by United Brotherhood of Carpenters v. Scott, ____ U.S. ____, 51 U.S.L.W. 5173, and by Griffin v. Breckenridge, 403 U.S. 88, to hold that even if there could be here developed by further pleading a class of handicapped persons with sufficient conditions or factors in common derived from their physical condition to be ascertainable or identifiable, it could not come within the provisions of 42 U.S.C. §1985(3). 722 F.2d at 1176-77. (Emphasis supplied by the court)

In other words, the "class" being addressed by the Tenth Circuit Court of Appeals was limited and distinguishable from the purported "class" addressed by the Second Circuit in Abrams.

Finally, while the existence of a purported conflict between the circuit courts of appeal decisions is a significant factor to be considered in determination of a Petition for Writ of Certiorari, such Petition should be granted only where the conflict is one that needs to be resolved by the Supreme Court. In light of this Court's decision in Scott, Respondents respectfully submit that no recurring conflict on the scope of a claim asserted under 42 U.S.C. §1985 exists to be resolved. For the reasons set forth above, the Petition should be denied.

**III. The Tenth Circuit's decision relating to non-racial classes is not erroneous, is not in conflict with decisions of other circuits or its own previous decisions on the same matter.**

Petitioner next asserts that the Tenth Circuit Court of Appeals ruled that non-racial classes are not entitled to the protection of 42 U.S.C. §1985(3) and that such is in conflict with other federal appellate court decisions.

Respondents submit that in light of the Scott decision clearly limiting the scope of a claim asserted under 42 U.S.C. §1985(3), that Petitioner's contention is without foundation. A review of the Tenth Circuit's opinion indicates that the Tenth Circuit relied expressly upon Scott, supra, which held that a non-racial class, i.e., non-union groups, are not entitled to the protection of or within the scope of classes contemplated by 42 U.S.C. §1985(3). Accordingly, the Tenth Circuit's decision is in accord with

applicable Supreme Court authority. See also, Griffin v. Breckenridge, supra; and Great American Fed. S. & L. Ass'n. v. Novotny, supra. Essentially, the Tenth Circuit did not make a conflicting decision as asserted by Petitioner.

In support of this purported basis for granting of the Petition, Petitioner relies upon the Fifth Circuit Court of Appeals decision in Scott v. Moore, 680 F.2d 979 (5th Cir. 1982). However, a review of this Court's decision in Scott, will indicate that this Court expressly overturned the Fifth Circuit's decision on the essential issue presented here when it stated:

> Both courts below answered that question; both held that the section not only reaches conspiracies other than those motivated by racial bias but also affords conspiracies

> against workers who refuse to join a union. We disagree with the latter conclusion and do not affirm the former. _____ U.S. _____, 103 S.Ct. 3359, 77 L.Ed.2d 1058.

This Court refused to affirm a holding that non-racial classes are afforded protection by 42 U.S.C. §1985. The significance of this Court's statement is that the protections afforded by 42 U.S.C. §1985 are greatly limited in light of the acts Congressional history. Scott and Novotny have excluded non-racial classes from the scope of §1985, contrary to Petitioner's assertion. The Tenth Circuit followed those decisions. As such, the Tenth Circuit Court of Appeals below did not erroneously rule in conflict with applicable authority from other federal courts on the specific

matter and as such, the Petition should be denied.

Petitioner further asserts that the opinion of the Tenth Circuit Court of Appeals in the instant matter is in conflict with its prior decision in Dry Creek Lodge, Inc. v. United States, 515 F.2d 962 (10th Cir. 1975), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). It is respectfully submitted that such an assertion is without foundation based upon a review of the specific cases. The issue presented to the Tenth Circuit in Dry Creek Lodge was not whether the plaintiffs were within a class recognized within the scope of 42 U.S.C. §1985. The existence or lack of existence of a proper class was not in issue. Rather, the issue presented on

appeal was whether the district court properly dismissed the case on a summary basis. As such, this purported conflict asserted by Petitioner is illusory.

A review of the Tenth Circuit Court of Appeals' opinion in the present matter will reveal that it followed not only applicable authority from this Court but authority previously issued by the Tenth Circuit Court of Appeals. See, Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) and Ward v. St. Anthony's Hosp., 476 F.2d 671 (10th Cir. 1973). Those opinions are consistent with Griffin and this Court's most recent pronouncement in Scott.

**IV. There is no important question of federal law which should be settled by this Court.**

Rule 17(1)(c), Rules of the Supreme Court of the United States, provide that the rendering of a decision by a federal court of appeals on an "important question of federal law which has not been, but should be, settled by this Court," may be grounds for the granting of a Petition for Writ of Certiorari. In that regard, the critical element is a showing by the Petitioner that the question presented and to be resolved is one of general importance, not just of importance to the Petitioner or to the instant dispute. Respondents respectfully submit that such general importance is lacking in this case and that Petitioner has failed to make the necessary showing.

As previously noted, this Court has passed on the question of the proper

scope of an action asserted under 42 U.S.C. §1985 on numerous occasions. Most notably, this Court has defined and limited the scope of §1985 in Griffin; Novotny, and most recently in Scott. In light of these decisions construing and limiting the scope of §1985, it is respectfully submitted that there is no federal question of general importance requiring decision by this Court.

It is critical to note that Petitioner does not assert under Rule 17(1)(c), Sup. Ct. R. that the decision of the Tenth Circuit Court of Appeals is in conflict with applicable decisions of this Court. Essentially, Petitioner has conceded that the Tenth Circuit's decision is in accord with prior decisions of this Court. It is strenuously submitted that such is a

critical factor to be considered and is grounds for the denial of the Petition.

**V. There has been no departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision.**

As earlier noted, Petitioner's contention that the District Court treated Respondents' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted as a Motion for Summary Judgment is not an issue properly before this Court because it was not the basis of the Tenth Circuit's decision nor was it raised in a timely fashion below. As such, consideration here is improper. While Petitioner sets forth a lengthy string of citations to support his proposition, a reading of the District Court oral ruling (see

Appendix to Petition for Writ of Certiorari, pp. A-24 through A-56) and the Tenth Circuit's opinion (Appendix to Petition for Writ of Certiorari, pp. A-1 through A-23) will establish that neither court acted in the manner in which Petitioner contends. The Tenth Circuit's opinion noted that the District Court had decided this case as a Motion to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted under Rule 12, Fed.R. Civ. P. and that the appropriate standard for dismissal and review was applied. Specifically, the Tenth Circuit stated:

> This appeal, as mentioned, reaches us on the dismissal of the §1985 cause for failure to state a claim, and must be examined under the applicable standard. 720 F.2d at 1175.

Clearly, Petitioner's contention that the Courts below erroneously departed from "the accepted and usual course of judicial proceedings. . . as to call for an exercise of this court's power of supervision" under Rule 17(1)(a), Sup. Ct. R. is without foundation and must be rejected.

In addition, Respondents submit that this purported issue presented for review is not properly before the Court in that it was not timely raised below. A review of Petitioner's Brief filed with the Tenth Circuit will reveal that Petitioner at no time asserted that the District Court treated the Motion to Dismiss as a Motion for Summary Judgment. As such, Petitioner's Issue No. 3, having not been raised below nor the basis of the Tenth Circuit's

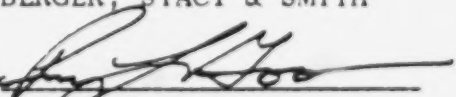
decision is not properly before this Court. Consideration of this contention here as a basis for the granting of the Petition for Writ of Certiorari is improper.

## CONCLUSION

WHEREFORE, inasmuch as the Tenth Circuit Court of Appeals decision was a consistent and proper application of federal law, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EIBERGER, STACY & SMITH

By 

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Attorneys for Respondents
Continental Title Company and
Angelo J. Visconti

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of February, 1984, three true and correct copies of the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed, first class postage prepaid and affixed thereto, properly addressed to David L. Smith, Esq., 2036 Dexter Street, Denver, Colorado 80207, counsel for Petitioner, and Mr. Timothy R. Arnold, Assistant Attorney General, State of Colorado, 1525 Sherman Street, Denver, Colorado 80202, counsel for Respondent Dorothy J. Porter. I further certify that all parties required to be served have been served.

Perry L. Goorman

# APPENDIX

Respondents incorporate herein by reference as if fully set forth verbatim the Appendix to the Petition for Writ of Certiorari.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Civil Action No. 81-F-1845**

| | |
|---|---|
| ROBERT L. WILHELM,<br><br>Plaintiff,<br><br>vs.<br><br>CONTINENTAL TITLE COMPANY,et al.,<br><br>Defendants. | CONSOLIDATED MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR MORE DEFINITE STATEMENT |

Defendants Continental Title Company and Angelo J. Visconti, through their attorneys undersigned, submit the following "Consolidated Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted and Motion for More Definite Statement". In support thereof, Defendants show unto the Court as follows:

## I. HANDICAP IS NOT A BASIS FOR A CLAIM UNDER §1985 AND §1986

1. This action was commenced on October 20, 1981, by Plaintiff, asserting inter alia, claims for relief under 42 U.S.C. §§ 1985 and 1986. On February 2, 1982, this Court granted Plaintiff leave to file a Second Amended Complaint amending and realleging such asserted claims.

2. An allegation of conspiracy on the basis of handicap or alleged membership in a "class of handicapped persons" is not recognized as a fundamental, constitutionally protected right or basis within the meaning of 42 U.S.C. §1985 and 42 U.S.C. §1986. 42 U.S.C. §1985 and §1986 are remedial statutes enacted to protect those fundamental rights of equal protection within the meaning of the Fourteenth

Amendment to the U.S. Constitution, and those alone.

3. The fundamental rights protected within the meaning of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. §§ 1985 and 1986 are limited to race, national origin, or color. Accordingly, there is no basis for Plaintiff's claim of a conspiracy on the basis of handicap and Plaintiff has therefore failed to state a claim upon which relief can be granted.

## II. TWO OR MORE PERSONS REQUIREMENT

1. On or about October 20, 1981, Plaintiff commenced this action asserting claims under 42 U.S.C. §1985 and 42 U.S.C. §1986. On or about February 2, 1982, this Court granted Plaintiff leave to file a Second Amended

Complaint, as appears of record. Pursuant to Court's Order of February 2, 1982, this Motion is submitted.

2. In his Second Amended Complaint, Plaintiff essentially alleges that Defendants Continental Title Company and Angelo J. Visconti, (its President and authorized agent), engaged in a conspiracy with each other. Specifically, Plaintiff alleges that ". . . the Company and Visconti engaged in a conspiracy to discharge Wilhelm from his employment with the company because of his membership of a class of handicapped persons" (¶ 6, Second Amended Complaint).

3. The acts of a single actor do not form the basis of a conspiracy. Jaramillo v. Lahti, _____ F.Supp. _____, Civil Action No. 80-F-

182, (Memorandum Opinion and Order dated July 24, 1981, D. Colo.). As a matter of law, the individual Defendant Angelo J. Visconti and the corporate Defendant, Continental Title Company are incapable of conspiring.

4. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted against both Defendants.

5. In the alternative, Plaintiff has failed to state a claim upon which relief can be granted against Defendant Angelo J. Visconti only, since, as a matter of law, said individual Defendant and the corporate Defendant are incapable of conspiring.

## III. LACK OF STATE ACTION

1. Plaintiff commenced this action on October 20, 1981 asserting against Defendants claims under 42 U.S.C. §§ 1985 and 1986 and in addition, apparently asserting a claim for relief against Defendants Continental Title Company and Angelo J. Visconti under 42 U.S.C. §1983 and the Fourteenth Amendment to the U.S. Constitution.

2. As against said Defendants, the Second Amended Complaint is utterly lacking and devoid of any factual allegations or support asserting "state action" by said Defendants as required to state a claim under 42 U.S.C. §§ 1985 and 1986. Further, Plaintiff's Second Amended Complaint is utterly lacking and devoid of any factual support or allegations of actions by Defendants

Continental Title Company and Angelo J. Visconti acting under color of Colorado state law or state action, as required to state a claim under 42 U.S.C. §1983 and the Fourteenth Amendment.

3. Accordingly, Plaintiff's Second Amended Complaint should be dismissed with prejudice for lack of "state action" by Defendants Contiental Title and Visconti.

## CONCLUSION

WHEREFORE, for the reasons stated above, and as more fully set forth in a Memorandum Brief filed contemporaneously herewith, Defendants above named move this Court for an order dismissing Plaintiff's Second Amended Complaint with prejudice for failure to state a claim upon which relief can be granted.

## MOTION FOR MORE DEFINITE STATEMENT

As an alternative to the foregoing Motions to Dismiss, Defendants Continental Title Company and Angelo J. Visconti, through counsel undersigned, submit the following Motion for More Definite Statement, and in support thereof, show unto the Court as follows:

1. This action was commenced on October 20, 1981, by Plaintiff, asserting claims for relief under 42 U.S.C. §§ 1985 and 1986. On February 2, 1982, this Court granted Plaintiff leave to file a Second Amended Complaint amending and realleging such asserted claims under 42 U.S.C. §§ 1985 and 1986.

2. In Paragraph 6 of the Second Amended Complaint, Plaintiff alleges that Defendants have engaged in a

conspiracy "with each other and with third persons". No other allegations are contained in the Second Amended Complaint relating to the identity of these unnamed "third persons".

3. As an alternative to Defendant's Consolidated Motions to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted, as well as Defendant's other Motions to Dismiss and/or Motion for Summary Judgment, as filed with respect to Plaintiff's claims asserted under 42 U.S.C. §§ 1985 and 1986, Defendants submit that such conclusory pleading without factual basis as contained in the Second Amended Complaint is totally insufficient to state a claim against Defendants. Plaintiff has failed to allege the identity of these "third persons" or the

acts of conspiracy of Defendants with these "third persons". At best Plaintiff has made general conclusory allegations of a conspiracy between Defendants and third persons. These conclusory allegations are totally unsupported by factual permit allegation sufficient to Defendants an opportunity to properly answer or respond.

Defendants should not be required to "guess" as to the allegations of a complaint and should be permitted to know the factual basis and support for Plaintiff's contentions.

As an alternative to Defendant's various Motions to Dismiss, (including but not limited to Failure To State A Claim Upon Which Relief Can Be Granted, Lack Of Subject Matter Jurisdiction, and Motions for Summary Judgment),

Defendants submit that this court should require Plaintiff to submit a More Definite Statement, setting forth with specificity the factual basis for the alleged conspiracy with unnamed third persons. Included in such allegations would be the identity of said persons, the dates when the alleged acts of conspiracy with each of said third persons occurred, the specific acts of conspiracy that formed the basis of the Complaint.

WHEREFORE, as an alternative to Defendant's various Motions to Dismiss and for Summary Judgment, Defendants move this Court for an order directing Plaintiff to submit a More Definite Statement as set forth above.

Dated this 12th day of February, 1982.

Respectfully submitted,

EIBERGER, STACY & SMITH

By /s/

Perry L. Goorman
410 Seventeenth Street
Suite 2390
Denver, Colorado 80202
Telephone: (303) 825-2390
Attorneys for Defendants

CERTIFICATE OF HAND DELIVERY

The undersigned hereby certifies that on this 12th day of February, 1982, a true and correct copy of the foregoing CONSOLIDATED MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR MORE DEFINITE STATEMENT has been hand delivered to the following:

David L. Smith, Esq.
2036 Dexter Street
Denver, Colorado 80207

William Levis
Assistant Attorney General
Human Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

/s/ Perry L. Goorman

Office - Supreme Court, U.S.
FILED
FEB 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1245

In The

# Supreme Court of the United States

October Term, 1983

ROBERT L. WILHELM,

*Petitioner,*

vs.

CONTINENTAL TITLE COMPANY,
ANGELO J. VISCONTI, and
DOROTHY J. PORTER,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly upheld the district court in dismissing the third claim of the second amended complaint on the ground that Dorothy J. Porter has absolute official immunity from suit under 42 U.S.C. 1983 and the due process clause of the fourteenth amendment to the Constitution of the United States.

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No. 83-1245

In The

# Supreme Court of the United States

October Term, 1983

ROBERT L. WILHELM,

*Petitioner,*

vs.

CONTINENTAL TITLE COMPANY, ANGELO J. VISCONTI, and DOROTHY J. PORTER,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

An oral opinion was issued by the United States District Court for the District of Colorado on May 12, 1982.

An opinion (not yet reported) was issued by the United States Court of Appeals for the Tenth Circuit on November 7, 1983.

### JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is November 7, 1983.

Petitioner relies on 28 U.S.C. 1254(1) and erroneously asserts that the Circuit Court of Appeals for the Tenth Judicial District departed from the accepted and usual course of judicial proceedings calling into question this court's power of supervision.

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## STATUTES AND RULES INVOLVED

Rule 12(b) Federal Rules of Civil Procedure:

> (b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as pro-

vided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Colo. Rev. Stat. 1973, 24-34-306(1), (2) and (4):

*24-34-306. Charge — complaint — hearing — procedure.* (1) Any person claiming to be aggrieved by a discriminatory or unfair practice as defined by parts 4 to 7 of this article may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written charge in duplicate which shall state the name and address of the respondent alleged to have committed the discriminatory or unfair practice and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such charge. Prior to any other action by the commission, the respondent shall be notified of the charges filed against him. (2) After the filing of a charge, the director, with the assistance of the staff, shall make a prompt investigation thereof. The director shall determine as promptly as possible whether probable cause exists for crediting the allegations of the charge. If the director determines that probable cause does not exist, he shall dismiss the charge and shall notify the person filing the charge and the respondent of such dismissal. If the director determines that probable cause exists, the respondent shall be served with written notice which states with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted. Immediately after such notice has been given, the director shall endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion.

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(4) When the director is satisfied that further efforts to settle the matter by conference, conciliation, and persuasion will be futile, he shall so report to the com-

> mission. If the commission determines that the circumstances warrant, it shall issue and cause to be served, in the manner provided by section 24-4-105 (2), a written notice and complaint requiring the respondent to answer the charges at a formal hearing before the commission, a commissioner, or a hearing officer. Such hearing shall be commenced within one hundred twenty days after the service of such written notice and complaint. Such notice and complaint shall state the time, place, and nature of the hearing, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.

Rules and Regulations of the Colorado Civil Rights Commission, Rule 4 (currently rule 10.5, 3 C.C.R. 708-1):

> *Rule 10.5—Investigation, Dismissal and Conciliation*
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> A. Expedited Resolution
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> Before the Director conducts an in-depth investigation, the charging party and the respondent may be invited to meet with the Division staff in an attempt to resolve the charge and to discuss the charge.
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> B. Discovery
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> The Director may use discovery procedures as provided in the Colorado Rules of Civil Procedure during the investigation of a charge.
>
> C. Dismissal
>
> If the Director determines based either upon the face of the charge or upon the information gathered during the investigation that probable cause for crediting the allegations of a charge does not exist, the Director shall dismiss the charge and notify the charging party in writing by either personal delivery or mail at the charging party's last known address, together with a notice of the charging party's right to appeal the dismissal to the Commission as provided in Rule

5. A copy of such notice shall be delivered or mailed to the respondent named in the charge.

D. Conference, Conciliation and Persuasion

1. If for whatever reason the charging party fails or refuses to sign a proposed conciliation agreement which the Director has accepted on behalf of the Division, the charging party has the right to appeal the Director's action to the Commission as provided in *Rule 10.6*. A written notice of the Director's action and report shall be mailed to all parties at their last known address no later than 5 days prior to the date the report is made to the Commission.

2. If conciliation fails and the Commission issues a written notice and complaint, the notice and complaint shall be delivered or mailed to the respondent at the last known address. If the notice is not served within 180 days after the filing of the charge, plus any extensions permitted as provided in 24-34-306(11), the jurisdiction of the Commission over the complaint shall cease, and the charging party may seek relief authorized in the law.

E. Disclosure

Without the written consent of all the parties, the Commission, the Director and the staff shall not disclose the filing of a charge, the information gathered during the investigation, or the efforts to eliminate such discrimination or unfair practice by conference, conciliation or persuasion unless the disclosure is made in connection with the conduct of the investigation, in connection with the filing of a petition seeking appropriate injunctive relief against the respondent under 24-34-507, or at a public hearing. Nothing in this paragraph shall be construed to prevent the Commission, the Director or the staff from disclosing final action on a charge, including the reasons for dismissing the charge and terms of a conciliation agreement, or the contents of an order issued after hearing.

F. Evidence Examination

Any of the parties or their counsel may examine any evidence contained in the investigative file of the charge, excluding documents or information made confidential by law. Evidence does not include Commission or Division staff work products or documents excluded by attorney-client privilege.

## STATEMENT OF THE CASE

Respondent, Dorothy J. Porter, adopts the statement of the case as presented by the petitioner, with the exception that respondent maintains that the district court on May 12, 1982 granted respondent's motion to dismiss without regard to any factual matters outside the pleadings, and therefore did properly follow the Federal Rules of Civil Procedure.

## SUMMARY OF ARGUMENT

The district court did not rely on any factual matters outside of the pleadings before it and, therefore, properly granted respondent's motion to dismiss without converting it to a motion for summary judgment. Under the circumstances of this case, involving an issue of absolute immunity rather than qualified immunity, the motion to dismiss was properly granted for lack of subject matter jurisdiction, as a matter of law.

## ARGUMENT

Where a trial court does not consider factual matters outside the pleadings, it is proper for the court to act on a motion to dismiss without converting it to a motion for summary judgment. *Hansbury v. Regents of the University of California*, 596 F.2d 944 (1979). In this case respondent Dr. Dorothy J. Porter, filed a motion to dismiss, motion for summary judgment or, in the alternative, motion to abstain and a brief in support of the motion directed at the second amended complaint. Attached to this brief were a letter from Dr. Porter to plaintiff Wilhelm advising him that the director had closed his complaint for failure of conciliation and advising him of his appeal rights under the Colorado Civil Rights Commission's rules. Also, attached to the brief were the commission rules which had been formally promulgated by the commission and currently published at 3 C.C.R. 708-1 *et seq.* These documents were attached to the brief and cited in support of the issues raised other than the issue of lack of jurisdiction based on absolute immunity. The district court, in granting the motion, only referred to it as a motion to dismiss and cited and relied only on the state statute, Colo. Rev. Stat. 1973, 24-34-306 and rule 4 of the commission's rules (currently rule 10.5, 3 C.C.R. 708-1, pp. 5-6). Rule 4 (10.5) of the commission rules constitutes a legal authority much like the statute rather than a factual matter. Without attachment to the brief the court could have considered the rule by citation alone. The court of appeals in its decision specifically cited the trial court's reliance on Colo. Rev. Stat. 1973, 24-34-301 *et seq.* (Order of November 7, 1983, petitioner's petition, A-20.) The trial court found under that statute that:

> As director of the Colorado Civil Rights Division, Ms. Porter is required by statute to investigate charges of discrimination, make a finding of probable cause and make a report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore logical that she should enjoy immunity in that regard.

(Oral Bench Order, Judge Sherman B. Finesilver, petitioner's petition for certiorari, A-41).

Thus, the district court treated the motion to dismiss as a motion to dismiss without regard to any matters outside the pleadings, based on the Colorado statute and agency regulation, as a matter of law. The case authority relied on by petitioner is inapplicable since all the cases cited rely either on questions of qualified immunity or involve situations where evidence outside the pleading was actually considered.

It must also be noted that the motion to dismiss, as granted, was based on lack of jurisdiction, which is not subject to the requirement that consideration of matters outside the pleadings requires that the motion shall be treated as one for summary judgment. See Federal Rules of Civil Procedure 12(b). *Hansbury, supra* at 948, n. 12.

Although it has been held in a number of cases that qualified immunity is an affirmative defense which may not be cited before trial except upon properly supported motion for summary judgment, absolute immunity can be disposed of on a motion to dismiss. *Imbler v. Patchman*, 424 U.S. 409 (1976); *Zapliler v. Robbins*, 507 F. Supp. 973 (D. Colo. 1981); *Friedman v. Weiner*, 515 F. Supp. 563 (D. Colo. 1981). In fact, in the case of *Butz v. Economou*, 438 U.S. 478, 512-513 (1978), the case establishing abso-

lute immunity in administrative adjudicatory officials, the United States Supreme Court upheld the granting of a motion to dismiss without treatment as a motion for summary judgment. *Id.* at 485.

Petitioner does not challenge the legal principle that an administrative adjudicator is entitled to absolute immunity. Here, in light of the Colorado statute, Dr. Porter, by law, clearly constitutes such an adjudicator. The motion to dismiss was properly granted.

## CONCLUSION

It is respectfully requested that this court deny the petition for certiorari.

Respectfully submitted,

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